90-1444

SUPREME COURT, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

v.

CARY WAYNE COX, *Respondent*

Petition for a Writ of Certiorari to the Court of Appeals for the Second Court of Appeals District of Texas

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QUESTION PRESENTED

Whether Texas courts have misconstrued *Jackson v. Virginia*'s rational fact-finder test by requiring, in a circumstantial evidence case, that the evidence supporting the verdict exclude every reasonable hypothesis of innocence.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF TEXAS, *Petitioner*

v.

CARY WAYNE COX, *Respondent*

TO THE HONORABLE JUSTICES
OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District of Texas.

OPINION BELOW

The opinion of the Court of Appeals has not been reported for publication. It is reproduced in the Appendix at A-1.

JURISDICTION

The Court of Appeals issued its opinion and judgment on June 14, 1990. The State timely filed a motion for rehearing on June 29, 1990, which was overruled on July 18, 1990. The State timely filed a petition for discretionary review on August 17, 1990. The Court of Criminal Appeals of Texas refused the petition on October 17, 1990. The State timely filed a motion for rehearing in the Court of Criminal Appeals on November 1, 1990, which was overruled on January 30, 1991. Jurisdiction in this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tex. Laws 1973, ch. 426, art. 2, § 1, at 1124 (prior version of Tex. Penal Code §19.05), in pertinent part:

> (a) A person commits an offense if he:
>
> . . . .
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.
>
> (b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1 (Vernon Supp. 1991), in pertinent part:

> (a) In this article:
>
> . . . .
>
> (2) "Intoxicated" means:
>
> (A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or
>
> (B) having an alcohol concentration of 0.10 or more.
>
> . . . .

(b) A person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place. The fact that any person charged with a violation of this section is or has been entitled to use a controlled substance or drug under the laws of this state is not a defense.

STATEMENT OF THE CASE

Tracey Higgins died when she was thrown off a motorcycle driven by Respondent. Respondent was convicted of involuntary manslaughter based on allegations that his intoxication caused Ms. Higgins' death. Purporting to apply the rational fact-finder test of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), but holding that in a circumstantial evidence case the proof supporting the verdict must exclude all reasonable hypotheses of innocence, the Court of Appeals ruled the evidence insufficient and ordered a judgment of acquittal.

The evidence

Respondent attended a party from 9:00 p.m. the night of June 26, 1987, until he left on the fateful motorcycle ride before sunrise the next morning. R. IV – 16-19, 49. The partygoers drank from a keg serving 380 cups of beer. R. IV – 18.

During the first part of the evening, Respondent consumed beer while playing a drinking game called "quarters." R. IV – 33-35. Around 1:00 a.m., he argued with Nadine Thalman, his former girlfriend, and chased her around a car. She was familiar with his behavior; that was the way Respondent acted when intoxicated. According to her, Respondent "could have been" intoxicated at that point. R. IV – 37-38.

About 4:45 a.m., Respondent borrowed a motorcycle and took Ms. Higgins, another guest at the party, for a ride. R. IV – 49. Respondent drank at least another one and a half beers not long before embarking. R. IV – 49, 75. The wreck

occurred shortly after the couple departed, about three blocks away. R. IV – 42-43, 49-50, 72.

After the accident, Respondent walked up to the injured girl, looked at her, and walked away. R. IV – 115. A passer-by tracked Respondent down and three times urged him to return to the scene to help the victim, but he refused. R. IV – 119-22. When asked why, Respondent pointed to a police car heading toward the scene and said, "[T]hat's the reason I can't go back down there . . . .they will take me to jail." R. IV – 122-23. The odor of alcohol on Respondent was "very very strong." R. IV – 119.

A paramedic called to treat Respondent also detected alcohol on his breath, R. IV – 148, as did a detective who talked to Respondent a couple of hours later at the hospital. R. IV – 264.

In conjunction with the taking of a blood sample from Respondent, the detective signed a form reciting that ". . . prior to the arrest I had reasonable grounds to believe, and do believe, that this person was driving or in actual physical control of a motor vehicle upon the public highways or upon a public beach in this State while intoxicated." R. VIII – 20 (State's exhibit 25). This document was admitted before the jury without restriction. R. IV – 220-21.

The blood sample showed Respondent had an alcohol concentration of 0.19 about two hours after the wreck. R. IV – 212-13, 238; V – 309. Testimony from a chemist and from the deputy medical examiner disclosed that the "legal limit for intoxication" in Texas is 0.10 and that Respondent's level was therefore almost twice that threshold. R. V – 309-10, 329.[1]

[1]When Ms. Higgins was killed, *intoxication* in the involuntary manslaughter statute was defined as the loss of one's normal mental or physical faculties as the result of the voluntary introduction of a substance into the body. See statute *supra*, p. 2. On the other hand, the statute setting out the "simple" offense of driving while intoxicated contained two definitions of intoxication, one of which defined that condition as an alcohol concentration of 0.10 or above. Tex. Rev. Civ. Stat. Ann. art. 6701*l*-1, §(a)(2) (Vernon Supp.

The opinion below; how the federal issue was raised

On appeal, Respondent argued that the evidence was insufficient under *Jackson v. Virginia* and Texas cases interpreting that decision. Appellant's brief, p. 8. The Court of Appeals set out the following standard for judging that claim:

> In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. State*, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984) (opinion on reh'g); *Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983) (opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, **a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant**. *Johnson v. State*, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); *Jackson*, 672 S.W.2d at 803.
>
> See Appendix at A-2 (emphasis added).

The Court of Appeals cites four Court of Criminal Appeals decisions in connection with its quotation from *Jackson v. Virginia*. We emphasize – and will explain in detail in the next section of the petition – that the issue raised is a federal question and not one concerning state law. All four of the Texas decisions embrace the rational fact-finder test of *Jackson v. Virginia* as ***the*** sufficiency test to be used for Texas criminal

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1991). See *supra* pp. 2-3. The Implied Consent Law (the statute which gave the detective the authority to obtain Respondent's blood sample) also contained that "per se" definition of intoxication. Tex. Rev. Civ. Stat. Ann. art. 6701*l*-5, §3(j) (Vernon Supp. 1991).

cases, but they also maintain that requiring the incriminating evidence to exclude every reasonable hypothesis of innocence is a proper method "for applying" the *Jackson v. Virginia* test in circumstantial evidence cases.

In its brief to the Court of Appeals, the State acknowledged that prevailing Court of Criminal Appeals decisions obligated the lower court to apply reasonable-hypothesis analysis as part of the *Jackson v. Virginia* test. However, the State explicitly challenged that analysis as conflicting with the true test of *Jackson v. Virginia*:

> The State continues to take issue with the Court of Criminal Appeals' formulation of the *Jackson* standard. *Jackson* makes it clear that the reasonable hypothesis test applied to circumstantial evidence cases is incorrect. Nevertheless, the Court of Criminal Appeals continues to apply it, labeling it an "analytical construct." The reasonable hypothesis test is actually the converse of the standard approved of in *Jackson*. Instead of asking if the jury could rationally have found guilt from the evidence, it asks if the jury could rationally have found innocence. *See Butler v. State*, 769 S.W.2d at 244 (concurring opinion).

State's brief in Court of Appeals, p. 6 n.1.

The Court of Appeals did not acknowledge the State's challenge, adopted reasonable-hypothesis analysis as its standard of review, and reversed and acquitted for insufficient evidence.

The State's motion for rehearing in the Court of Appeals again argued that reasonable-hypothesis analysis was inconsistent with *Jackson v. Virginia*. State's mot. for reh., pp. 7-8 (excerpts in Appendix at A-8-9.) The motion was overruled without opinion. Appendix at A-6.

The State's petition for discretionary review likewise contended that reasonable-hypothesis analysis conflicts with *Jackson v. Virginia*, providing a six-page discussion of essen-

tially the same cases and arguments made to this Court. State's pet. for review, pp. 11-17 (excerpts in Appendix at A-10-11). The State's petition was refused. Appendix at A-7.

The State's motion for rehearing following the refusal again raised the conflict between *Jackson* and the reasonable-hypothesis analysis. State's mot. for rehearing in Court of Criminal Appeals, pp. 2-4, 15. The motion for rehearing was overruled. Appendix at A-7.

REASONS FOR GRANTING THE WRIT

I. THE "REASONABLE HYPOTHESIS OF INNOCENCE ANALYSIS" WHICH THE TEXAS COURTS HAVE ENGRAFTED ONTO *JACKSON V. VIRGINIA*'S RATIONAL FACT-FINDER TEST IS IN DIRECT CONFLICT WITH *JACKSON* ITSELF, AS WELL AS WITH STATEMENTS BY THIS COURT IN *JOHNSON V. LOUISIANA*.

A. The Texas cases

We attack an interpretation of *Jackson v. Virginia*'s rational fact-finder test that began in a series of 1983 decisions by the Texas Court of Criminal Appeals. In those opinions, the Court of Criminal Appeals confirmed that Texas courts would use the *Jackson v. Virginia* test for judging the sufficiency of the evidence. However, the court held that in applying the *Jackson* test in circumstantial evidence cases a reviewing court should ask whether the evidence supporting the verdict excluded all reasonable hypotheses of innocence, and should reverse and acquit if the answer was negative. *Carlsen v. State*, 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Freeman v. State*, 654 S.W.2d 450, 455-56 (Tex. Crim. App. 1983); *Denby v. State*, 654 S.W.2d 457, 463-64 (Tex. Crim. App. 1983);

Wilson v. State, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983). *Carlsen* is considered the lead case on this issue.[2]

This Texas interpretation of *Jackson v. Virginia* is best illustrated by *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), which reaffirmed *Carlsen's* reasonable-hypothesis analysis as a way of implementing the *Jackson* test. First, *Butler* embraced the rational fact-finder test of *Jackson v. Virginia*:

> To recapitulate, the test as delineated in *Jackson* requires us, as the reviewing court, to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

Butler v. State, 769 S.W.2d at 239.

Second, the court held that "circumstantial evidence cases have no different standard of review than those cases supported by direct evidence," *Butler v. State*, 769 S.W.2d at 238, but it appended this footnote:

> Implicit in this statement is a question concerning the status of the reasonable hypothesis theory. We reiterate:
>
> **[W]e are unable to devise or discover any reason, . . . , for abandoning the utilitarian 'exclusion of outstanding reasonable hypotheses' analysis for applying the above 'standard for review' [*Jackson*] in circumstantial evidence cases.** By the nature of circumstantial evidence, in order to determine it rationally establishes guilt beyond a reasonable doubt, a process of elimination must be used . . . . **Stated in the converse, if the evidence supports an inference other than the guilt of the**

[2]In Respondent's case, the Court of Appeals named one of the 1983 decisions when setting out the applicable standard of review (*Wilson v. State*). Similarly, the two decisions cited for reasonable-hypothesis analysis cite back to the 1983 opinions. *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); *Johnson v. State*, 673 S.W.2d 190, 195 (Tex. Crim. App. 1984). See Appendix at A-2.

> **appellant, a finding of guilt beyond a reasonable doubt is not a rational finding.**
>
> *Carlsen*, 654 S.W.2d at 449. We recognize that the United States Supreme Court declined, in *Jackson*, to adopt this theory as part of the *Jackson* standard for review. Likewise, we do not mean to imply an adoption of this theory as the standard of review for sufficiency of the evidence. **The reasonable hypothesis theory as utilized by this Court is merely an analytical construct to facilitate the application of the *Jackson* standard.**

Butler v. State, 769 S.W.2d at 238 n.1 (bold-faced emphasis added).

Two members of the Court of Criminal Appeals strongly criticized the use of this "analytical construct":

> Finally, I must point out the folly in the majority's denouncement of prior applications of *Jackson* while they themselves attempt to validate a method of sufficiency review that *Jackson* expressly disapproved. In footnote 1, the majority 'reiterates' the continued validity of the "outstanding reasonable hypothesis" theory, op. at 238. However, the *Jackson* Court explicitly rejected this notion . . . . [quoting from *Jackson v. Virginia*, 443 U.S. at 325-26]. Thus, *Jackson* specifically denounces the "reasonable hypothesis theory" while the majority embraces it. Further, whether this theory is euphemistically labeled as an "analytical construct" (see op. at 238, fn. 1) or a standard of review is of little moment; the resultant effect remains the same – the adoption of a theory of sufficiency review expressly denounced by *Jackson*. Thus, although the majority, by all auspices, fully adheres to *Jackson*, it appears to me that such adherence is disturbingly selective.

Butler v. State, 769 S.W.2d at 244 (Judge White, concurring in the result).

B. The conflict with this Court's decisions

As Judge White noted in his concurrence in *Butler*, this Court expressly rejected the argument that *Jackson*'s rational fact-finder test required the evidence to exclude all hypotheses of innocence:

> Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past . . . . We decline to adopt it today.

Jackson v. Virginia, 443 U.S. at 326-27, 99 S.Ct. at 2792-93.

Indeed, the majority in *Butler* acknowledged that this Court declined to require the exclusion of all hypotheses of innocence, yet those judges proceeded to reaffirm use of that analysis as a "construct to facilitate the application of the *Jackson* standard." *Butler v. State*, 769 S.W.2d at 238 n.1

What the Court of Criminal Appeals fails to understand is that *Jackson*'s rational fact-finder test and the reasonable-hypothesis construct are not harmonious phrasings of the same rule. The evidence in a criminal case could be strong enough to satisfy the rational fact-finder test but not strong enough to exclude as a matter of rigorous logic every hypothesis of innocence. Thus, application of the "analytical construct" can bring about the reversal of a conviction that would be affirmed under a proper application of *Jackson v. Virginia*. Use of the construct undermines, rather than facilitates, *Jackson*.

When this Court set out the basic sufficiency test in *Jackson*, it concluded with a citation to *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972):

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See

> *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625.

Jackson v. Virginia, 443 U.S. at 319, 99 S.Ct. at 2789. At the cited pages in *Johnson v. Louisiana*, the Court addressed whether the reasonable-doubt standard was violated by a state statute allowing a conviction on a non-unanimous vote. In rejecting that argument, the Court said:

> **That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard.** Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such that the jury would have been justified in having a reasonable doubt . . . .

Johnson v. Louisiana, 406 U.S. at 362-63, 92 S.Ct. at 1625 (emphasis added).

The effect of *Jackson* and *Johnson* is to divide criminal cases into three categories. In one category are cases where the evidence is so strong that every rational trier of fact would convict if it viewed the evidence in the light most favorable to the verdict. In the middle category, the incriminating evidence is less compelling, so while some rational fact-finders would convict, some would not. In the final category, the evidence is so lacking that no rational trier of fact would conclude that guilt was proven beyond a reasonable doubt even under the most favorable view of the evidence.

Under the rational fact-finder test, convictions in the middle category would be upheld because "any" (i.e., "some") rational trier of fact "could" convict even though another rational trier of fact could acquit. On the other hand, reasonable-hypothesis analysis overturns verdicts in the middle category, despite the presence of a rational theory of guilt beyond a reasonable doubt, because by definition there is also a rational theory of innocence. In other words, reasonable-hypothesis analysis upholds a conviction only if every rational trier of fact would convict under the most favorable view of

the evidence. This is the conflict the Texas courts either do not understand or will not acknowledge.[3]

This Court should grant review to correct this patent error by the Texas courts.

C. The decisions of the Texas courts are in conflict with those of several other state courts of last resort and with decisions of the United States Courts of Appeals.

The Sixth Circuit addressed our question in *York v. Tate*, 858 F.2d 322 (6th Cir. 1988), *cert. denied*, 490 U.S. 1049 (1989). There, the federal district court applied reasonable-hypothesis analysis because the Ohio state courts used it. The Ohio doctrine was known as "the *Kulig* rule," referring to *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974). The Sixth Circuit rejected that approach under *Jackson v. Virginia*, saying:

> . . . . By applying the *Kulig* rule, the district court turned the *Jackson* standard on its head. Rather than asking whether *any* reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner *not* guilty . . . . Such an analysis is totally at odds with the

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[3]The Court of Criminal Appeals went astray when it failed to catch the analytical error in this statement: "if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449. *See also Butler v. State*, 769 S.W.2d at 238 n.1. That statement is contradicted by *Johnson v. Louisiana*, of course. Texas' approach came to its logical conclusion in *Martin v. State*, 753 S.W.2d 384 (Tex. Crim. App. 1988), where the court invoked *Jackson v. Virginia* and the reasonable-hypothesis construct, 753 S.W.2d at 387, and then made these observations about the sufficiency of the evidence:

> Just as a rational trier of fact could have found appellant guilty of the offense so also could a rational trier of fact have found that appellant had no idea that the methamphetamine was in his wife's purse . . . .
>
> While the facts may be highly suspicious, we are compelled to hold that the State did not sustain its burden of proof . . . .

Martin v. State, 753 S.W.2d at 388 (acquittal ordered).

> standard of review set forth by the Supreme Court in *Jackson* . . . .

York v. Tate, 858 F.2d at 330.

State courts of last resort have similarly concluded that *Jackson v. Virginia* does not require the incriminating evidence to exclude every reasonable hypothesis of innocence. *Commonwealth v. Latimore*, 378 Mass. 671, 393 N.E.2d 370, 374-75 (1979); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684, 689 (1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38 (1981); *State v. Derouchie*, 140 Vt. 437, 440 A.2d 146, 148-50 (1981); *Poellinger v. State*, 153 Wis.2d 493, 451 N.W.2d 752, 757 (1990).

In addition, every United States Court of Appeals has abandoned use of reasonable-hypothesis analysis when reviewing federal convictions. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (collecting cases), *aff'd*, 462 U.S. 356 (1983).

II. THE IMPORTANCE OF THIS QUESTION IS DEMONSTRATED BY JUSTICE WHITE'S DESIRE TO GRANT CERTIORARI EARLIER THIS TERM IN *TEXAS V. SKELTON*.

The question we bring forward was presented to the Court by another Texas prosecution office earlier this term. *Texas v. Skelton*, 111 S.Ct. 210 (1990), *denying cert. to*, 795 S.W.2d 162 (Tex. Crim. App. 1989). Justice White's notation that he would have granted certiorari in *Skelton* is an indication of the importance of the question. In addition, we stress that in Respondent's case, perhaps unlike the situation in *Skelton*, the State has at every stage of the appellate process challenged the use of reasonable-hypothesis analysis as a method of applying *Jackson v. Virginia*'s rational fact-finder test. See supra, pp. 5-7.

III. THE CHALLENGED TEXAS DECISIONS ARE NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

A state court would, of course, be free to decide that state law holds the prosecution to a more stringent standard of appellate review than the United States Constitution mandates. However, a state may not, while purporting to rely on federal law, impose a stricter test than this Court has required. *See Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570 (1975); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6, 101 S.Ct. 715, 722 n.6, 66 L.Ed.2d 659 (1981).

As discussed above, the Court of Criminal Appeals announced that *Jackson v. Virginia* contained the "ultimate" sufficiency test to be applied to both direct and circumstantial evidence cases, with the reasonable-hypothesis analysis being a tool "for applying" the *Jackson* test. *Carlsen v. State*, 654 S.W.2d at 449-50; *Butler v. State*, 769 S.W.2d at 238-39 & n.1.

Thus, the opinion in Respondent's case and the Court of Criminal Appeals decisions from which it draws succor "fairly appear to rest primarily on federal law, or to be interwoven with the federal law," and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Montana v. Hall*, 481 U.S. 400, 404 n.3, 107 S.Ct. 1825, 1827 n.3, 95 L.Ed.2d 354 (1987); *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). *See also Texas v. Brown*, 460 U.S. 730, 732 n.1, 103 S.Ct. 1535, 1538 n.1, 75 L.Ed.2d 502 (1983).

Indeed, the State can say with confidence that there is no decision in which a Texas court has made a "plain statement" under *Michigan v. Long* to the effect that the analytical construct of *Carlsen v. State* and *Butler v. State* is grounded solely in state law.

Finally, the Texas decisions at a minimum reveal the type of misunderstanding about federal law that would permit this

Court to exercise its jurisdiction and resolve the federal question, if only to enable the state court to address any state law question free of misconceptions concerning federal constitutional dictates. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977).

This Court has jurisdiction to decide the question presented, and it should exercise that jurisdiction in light of the flagrant error in the Texas courts' constitutional analysis.

IV. RESPONDENT'S CONVICTION WOULD HAVE BEEN AFFIRMED UNDER THE TRUE TEST OF *JACKSON V. VIRGINIA*.

The jury heard that Respondent attended an all night keg party. He drank beer during a drinking game early in the festivities, he behaved midway through the evening in a fashion that his former girlfriend was familiar with seeing when he was intoxicated (she said he "could have been" intoxicated at that time), and he consumed at least a beer and a half in the early morning hours before leaving on the tragic motorcycle ride. Respondent smelled strongly of alcohol when tracked down near the scene of the wreck and when examined by medical personnel. He refused to go to the aid of his injured companion because he was afraid the police would jail him.

From this evidence alone, a rational jury *could* have concluded that Respondent was intoxicated at the time of the wreck. Yet the Court of Appeals dismissed the impact of this proof virtually without explanation. Appendix at A-3-4. True, there may be a possibility that Respondent had not lost the normal use of his faculties despite evidence of his drinking and abnormal behavior, but a jury was not compelled to reach that conclusion.

In addition, the undisputed evidence established that Respondent had an alcohol concentration of 0.19 about two hours after the accident. Two witnesses told the jury that the legal limit for intoxication in Texas was 0.10.

The court below, however, minimized this evidence by noting that an alcohol concentration of 0.10 was not conclusive proof of intoxication under the involuntary manslaughter statute (presumably raising, in the court's mind, the reasonable hypothesis that Respondent had not actually lost the normal use of his faculties), by noting the absence of testimony that Respondent staggered, swayed, or slurred his speech (factors which the jury was equally able to consider in its deliberations), and by claiming there was no testimony concerning the effect of a 0.19 alcohol concentration (failing even to mention the medical and scientific experts who told the jury the legal limit was 0.10).[4] Appendix at A-3-5. Surely a rational jury *could* conclude that a person that far above the legal limit was not fully in control of himself, just as those jurors would surely have felt they were in trouble had their doctor told them their blood pressure or cholesterol level was almost twice the medical limit.

Finally, the jury had before it the blood-test form on which the detective expressed an opinion that Respondent was intoxicated. Perhaps the preprinted nature of that form could have caused a jury to downplay its importance, but on the other hand, a rational jury could have accorded it significant weight.

Had the Court of Appeals considered the impact of this evidence as an interrelated whole under *Jackson v. Virginia*, rather than as isolated bits of proof concerning which an appellate court seeks to discern inferences supporting an acquittal, the court would have realized that a rational jury *could* have concluded that Respondent was intoxicated, even if the jury would not have been compelled to so find.

This is a classic example of a case that is affirmable under *Jackson v. Virginia* even if the reasonable-hypothesis construct is not satisfied. It provides an excellent vehicle to make that distinction clear to the Texas courts.

---

[4]It is especially odd that the Court of Appeals ignored that testimony when Respondent himself thought it important to bring out that the victim had an alcohol concentration above the "legal limit" as well. R. V – 329 (victim's level was 0.14).

CONCLUSION

The Court should grant certiorari and review the judgment below. The inconsistency between *Jackson's* rational fact-finder test and the reasonable-hypothesis construct is so clear that a summary reversal would be appropriate.

The Court may wish to withhold immediate action on this petition. During the past year, the Court of Criminal Appeals has granted review in several cases to consider whether the *Carlsen-Butler* construct should be repudiated as in conflict with *Jackson v. Virginia*. The lead case, *Geesa v. State*, #290-90 (Tex. Crim. App. pet. granted May 23, 1990), was filed by this office and argued by this writer on January 10, 1991. To be frank, we are not optimistic that the Court of Criminal Appeals will decide this issue in our favor. This writer would characterize the reception he was given in the *Geesa* oral argument as chilly, and the Court of Criminal Appeals refused the State's motion for rehearing in Respondent's case some two weeks later despite the fact that the pendency of *Geesa* and related cases had been expressly called to the court's attention. The State will, of course, immediately advise this Court of any disposition in *Geesa* or its companions that might affect this Court's decision to grant or deny certiorari.

Respectfully submitted,

TIM CURRY
District Attorney
Tarrant County, Texas

C. CHRIS MARSHALL
Assistant District Attorney
Chief, Appellate Section
Counsel of Record

Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

NO. 02-89-072-CR

CARY WAYNE COX
VS.
THE STATE OF TEXAS

Delivered June 14, 1990

OPINION

Cary Wayne Cox was convicted by a jury of involuntary manslaughter. *See* TEX. PENAL CODE ANN. sec. 19.05 (Vernon 1974). The jury assessed punishment at six years confinement in the Texas Department of Corrections and a $5,000 fine both of which were probated for four years. Cox contends on appeal that the evidence was insufficient to support his conviction for involuntary manslaughter.

We reverse the judgment of the trial court because the evidence is insufficient to sustain his conviction.

On June 27, 1987, appellant, Cary Wayne Cox, and the victim, Tracey Dawn Higgins, attended a party where there was a keg of beer from which the party-goers drank. Sometime between 4:45 a.m. and 5:00 a.m., Steve Adkins, a fellow party-goer, allowed Cox to take his motorcycle for a ride, and Cox took Higgins along with him.

The accident occurred approximately three blocks from the house where the party was held. Higgins was apparently thrown from the motorcycle and died within one and a half hours after the accident occurred. Testimony revealed that Cox left the scene even though he had also been hurt. He was later found, treated by paramedics, and subsequently taken to Harris Hospital. At the hospital, a blood test was taken which

resulted in a 0.19% weight volume ethyl alcohol or 0.19 grams of alcohol per 100 milliliters of blood.

In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. State*, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984) (opinion on reh'g); *Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983) (opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. *Johnson v. State*, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); *Jackson*, 672 S.W.2d at 803.

Appellant contends there is insufficient evidence to prove that he was intoxicated at the time of the accident, or that he was the driver of the motorcycle at the time of the accident. We will not discuss appellant's argument that the State failed to prove he was the driver of the motorcycle at the time of the accident because we find the evidence was insufficient to establish that Cox was intoxicated at the time of the accident.

Cox was convicted of involuntary manslaughter under the former version of TEX. PENAL CODE ANN. sec. 19.05 which provided in part:

> (a) A person commits an offense if he:
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical facilities by reason of the voluntary introduction of any substance into his body.

Ch. 426, art. 2, sec. 1, 1973 Tex. Gen. Laws 1122, 1124, *amended by* ch. 307, sec. 1, 1987 Tex. Gen. Laws 1698.

A review of the record reveals that Cox's ex-girlfriend saw him drink a quarter of a cup of beer and testified that, based on his actions in which Cox chased her around the car, he *could have been* intoxicated. Adkins, the owner of the motorcycle, testified that he and Cox drank one and one-half beers before Cox left on the motorcycle. He testified he remembered Cox was not drinking earlier because he remembered thinking it was kind of odd not to see him drink. In addition, there was testimony by a police officer, a paramedic, and a witness who came upon the scene of the accident that Cox smelled of alcohol.

Cox concedes there was evidence he had been drinking beer around the time of the accident. However, Cox contends there was no evidence that he had lost the normal use of his mental or physical faculties because of the beer. Therefore, he argues the evidence was insufficient that he was either intoxicated at the time of the accident or that the alleged intoxication actually caused the accident.

The State concedes the expert testimony that the 0.19% blood alcohol concentration which was over the legal limit was not by itself sufficient to show that Cox had lost the normal use of his mental or physical faculties under the definition of "intoxication" in the involuntary manslaughter statute at the time of the offense. However, the State asserts that the testimony that Cox had consumed beer before the accident, the testimony by the police officer, paramedic, and another witness that Cox smelled of alcohol, and the fact that the blood test revealed 0.19% alcohol rendered the evidence sufficient to sustain the conviction for involuntary manslaughter.

The State directs our attention to *Martin v. State*, 724 S.W.2d 135 (Tex.App. – Fort Worth 1987, no pet.) and *Irion v. State*, 703 S.W.2d 362 (Tex.App. – Austin 1986, no pet.). In *Martin*, the court held the testimony of the arresting officer that the defendant stumbled as he got out of his car, staggered and swayed as he stood, slurred his speech, had bloodshot and watery eyes, and failed three field sobriety tests, together with the testimony of the expert witness who stated that someone who tested at 0.21% on an intoxilyzer test, would not have the normal use of his mental or physical faculties by means of the introduction of alcohol into his system, constituted sufficient evidence to establish the defendant's intoxication at the time of his arrest. *Martin*, 724 S.W.2d at 137.

Furthermore, the court in *Irion* held that the opinion testimony of the arresting officer standing alone was sufficient to prove the element of intoxication. *Irion*, 703 S.W.2d at 364. However, in *Irion*, as in *Martin*, the arresting officer testified that the defendant was weaving while driving, had bloodshot eyes, smelled of alcohol, swayed, and failed a field sobriety test. Both of these cases can be distinguished from the present case because in the present case the only testimony from the officer was that Cox smelled of alcohol. There was no testimony from either the officer, the paramedic, or the other witness that Cox was staggering, swaying, slurring his speech, or had bloodshot eyes. In addition, there was no testimony in the present case as to what effect someone who tested at 0.19% on an intoxilyzer test would have on the normal use of his mental or physical faculties.

Cox relies on *McCafferty v. State*, 748 S.W.2d 489, 491 (Tex.App. – Houston [1st Dist.] 1988, no pet.), for the proposition that since the State failed to explain absorption and metabolism rates of intoxication or in any way connect the blood test results to his condition some two hours earlier, the blood test results were insufficient to establish either intoxication at the time of the accident or that the alleged intoxication actually caused the accident. In *McCafferty*, the court held that the officer's testimony that the defendant was intox-

icated when the officer arrived at the accident at 3:50 a.m. together with the breath test showing that the defendant was intoxicated at 4:45 a.m. were alone not sufficient to establish that the defendant was intoxicated at 2:30 a.m. when driving. *Id.* at 491.

The court further held that the State's expert witness did not explain absorption and metabolism rates or in any way connect the breath test results at 4:45 a.m. to the defendant's condition when driving at 2:30 a.m. and therefore, concluded the State failed to show that the defendant was intoxicated while driving and found the evidence to be insufficient to support the conviction.

Because the involuntary manslaughter statute in effect at the time of the accident did not provide for having an alcohol concentration of 0.10% or more as a means of proving intoxication, the fact that Cox tested at 0.19% is alone not sufficient without some testimony regarding the effect a 0.19% alcohol concentration would have on a person's mental or physical faculties. Therefore, after a careful review of the record, we hold the evidence was insufficient to sustain his conviction for involuntary manslaughter. Cox's point of error is sustained.

Finding insufficient evidence to sustain appellant's conviction for involuntary manslaughter, we reverse and remand the judgment of the trial court with an order instructing the trial court to enter a judgment of acquittal.

/s/
DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS, DAY, JJ.; LATTIMORE, J. (Not Participating)
DO NOT PUBLISH
TEX. R. APP. P. 90(e)

JUN 14 1990

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

No. 2-89-072-CR

Cary Wayne Cox
vs.
The State of Texas

Delivered July 18, 1990

ORDER

On this day came on to be considered State's motion for rehearing and appellant's response.

It is the opinion of this Court that said motion should be and is hereby overruled. It is the order of this Court that the opinion and judgment of June 14, 1990, stand unchanged.

The Clerk of this Court is directed to transmit a copy of this Order to the attorneys of record.

It is so ordered.

SIGNED THIS 18th day of July, 1990.

/s/ _____
DAVID F. FARRIS
JUSTICE

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

No. 0912-90

CARY WAYNE COX
VS.
THE STATE OF TEXAS
(COA#: 02-89-00072-CR)

Delivered October 17, 1990

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

No. 0912-90

CARY WAYNE COX
VS.
THE STATE OF TEXAS
(COA#: 02-89-00072-CR)

Delivered January 30, 1991

On this day the State's Motion for Rehearing was denied. Judge Baird would grant on nos. 1 & 2.

Thomas Lowe, Clerk

IN THE COURT OF APPEALS FOR THE
SECOND COURT OF APPEALS DISTRICT OF TEXAS

NO. 02-89-0072-CR

CARY WAYNE COX
V.
THE STATE OF TEXAS

STATE'S MOTION FOR REHEARING
[Excerpts]

TO THE COURT OF APPEALS:

POINTS ON REHEARING

. . . .

2. The Court of Appeals has reviewed the evidence under a standard more stringent than is required by *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and reliance on this improper standard has caused the Court to reverse a conviction which is clearly affirmable under the proper standard.

DISCUSSION

. . . .

II. Reasonable Hypothesis Standard

At page three of the slip opinion, the Court recites that ". . . a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant." The reversal indicates that the Court has discerned a reasonable hypothesis of innocence.

As it has done in many other cases before this Court, the State reiterates that the reasonable-hypothesis analysis is inconsistent with *Jackson v. Virginia*. *Jackson* asks only whether *any* trier of fact could have rationally found guilt

beyond a reasonable doubt. The reasonable hypothesis construct asks whether there is any reasonable hypothesis of innocence. This turns the *Jackson* test upside down. Instead of asking whether any trier of fact could have rationally convicted, the construct asks if any trier of fact could have rationally acquitted. Stated another way, the court is asking not whether *any* trier of fact could have rationally convicted, but whether *every* trier of fact would have rationally been compelled to convict.

This Court should renounce, or at least call into question, the reasonable-hypothesis-of-innocence analysis. [footnote omitted] That analysis is in conflict with *Jackson* and has caused the Court to reverse a conviction that is eminently affirmable under a proper application of the *Jackson* test.

. . . .

[State's motion for rehearing in Court of Appeals, pp. 2, 7-8.]

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

NO. 0912-90

CARY WAYNE COX
V.
THE STATE OF TEXAS

STATE'S PETITION FOR REVIEW

[Excerpts]

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

. . . .

GROUNDS FOR REVIEW

. . . .

3. The Court of Appeals erred by applying the wrong standard of appellate review. The language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and previous cases holding that the reasonable hypothesis standard is properly applied as an "analytical construct" of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), should be overruled as it is in conflict with *Jackson v. Virginia*.

. . . .

DISCUSSION

. . . .

The error in this Court's analysis is that it correctly identifies and purports to follow the basic *Jackson* test (whether, viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found every element of the offense beyond a reasonable doubt), but then erroneously goes on to conclude that the converse is true (that if the evidence supports an inference other than guilt, a finding

of guilt beyond a reasonable doubt is not a rationai finding). *See Butler v. State*, 769 S.W.2d at 238, n.1, quoting *Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983).

The converse is not true, or at least this Court's statement of the converse misapprehends the thrust of *Jackson v. Virginia*. *Jackson* asks only whether *any* trier of fact could have rationally found guilt beyond a reasonable doubt. The Court's application of the "analytical construct," asking whether there is any reasonable hypothesis of innocence, turns the *Jackson* test upside down. Instead of asking whether any trier of fact could have rationally convicted, the construct asks if any trier of fact could have rationally acquitted. Stated another way, the court is asking not whether *any* trier of fact could have rationally convicted, but whether *every* trier of fact would have rationally been compelled to convict.

. . . .

[State's petition for review, pp. 2, 12.]

MAY 9 PAGE 3

ORIGINAL

FILED
APR 15 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DISTRIBUTED
APR 18 1991

- 90-1444 -

THE STATE OF TEXAS, PETITIONER

VS.

CARY WAYNE COX, RESPONDENT

MOTION FOR LEAVE TO FILE
BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI IN FORMA PAUPERIS

TO THE HONORABLE SUPREME COURT;

NOW COMES Movant, CARY WAYNE COX, Respondent, by and through his court-appointed attorney, MICHAEL LOGAN WARE, and moves this Court, pursuant to Supreme Court Rule 39, for permission to file his Brief in Opposition to Petition for Writ of Certiorari in forma pauperis, and would respectfully show the Court as follows:

I.

In February, 1989 Respondent was convicted in State District Court of involuntary manslaughter. After his conviction,

Respondent indicated his desire to appeal and, after a contested evidentiary hearing, was found by the trial court to be indigent and was appointed the undersigned to represent him in the prosecution of his appeal through the State appellate courts. Said process included an indigency affidavit sworn to by Respondent.

II.

Although the undersigned maintained contact with Respondent for a period of time after his conviction, contact has now been lost and repeated efforts to reestablish contact have failed. Consequently, no additional indigency affidavit could be obtained from Respondent.

III.

The funds allotted to the undersigned as appointed counsel on appeal have already been paid and did not include the significant printing and filing costs normally associated with a Brief in Opposition to Petition for Writ of Certiorari. Neither did said funds purport to compensate the undersigned for time involved in pursuing this appeal past the State level.

IV.

Nevertheless, the undersigned believes that it would be appropriate to file with this Court a short Brief in Opposition to the State's Petition for Writ of Certiorari. The undersigned has attached his own affidavit in support of this Motion.

WHEREFORE, PREMISES CONSIDERED, counsel for Movant prays that this Motion be granted and that he be allowed to proceed in

this Court for purposes of filing his Brief in Opposition to Petition for Writ of Certiorari in forma pauperis.

Respectfully submitted,

MICHAEL LOGAN WARE
The Sinclair Building
512 Main Street, Suite 911
Fort Worth, Texas 76102
(817) 332-1221

By: Michael Logan Ware
MICHAEL LOGAN WARE
TX State Bar No. 20864200

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of April, 1991, a true and correct copy of the foregoing Motion for Leave to File Brief in Opposition to Petition for Writ of Certiorari In Forma Pauperis was forwarded by United States Mail, postage prepaid, to Mr. C. Chris Marshall, Assistant District Attorney, Chief, Appellate Section, Tarrant County Justice Center, 401 W. Belknap, Fort Worth, Texas 76196.

Michael Logan Ware
MICHAEL LOGAN WARE

A F F I D A V I T

THE STATE OF TEXAS §

COUNTY OF TARRANT §

BEFORE ME, the undersigned Notary Public in and for said County and State, on this day personally appeared MICHAEL LOGAN WARE, who being by me duly sworn, deposes and says:

"I was the Respondent's original attorney at the trial of this cause. After Respondent's conviction, he indicated his desire to appeal and, after a contested evidentiary hearing, he was found by the trial court to be indigent and I was appointed to represent him in the prosecution of his appeal through the State appellate courts. Said process included an indigency affidavit sworn to by Respondent.

"Although I maintained contact with Respondent for a period of time after his conviction, I have now lost contact with the Respondent and my repeated efforts to reestablish contact have failed. Consequently, I have been unable to obtain a second indigency affidavit, but I have no reason to believe that Respondent's financial situation is any better than it was in February of 1989, when the original affidavit was signed.

"The funds originally allotted to me as court-appointed counsel on appeal have already been paid and did not include the significant printing and filing costs normally associated with a brief in opposition to petition for writ of certiorari. Neither did said funds purport to compensate the undersigned for time

involved pursuing this appeal past the State level. Nevertheless, the undersigned believes that it would be appropriate to file with this Court a short Brief in Opposition to the State's Petition for Writ of Certiorari."

Michael Logan Ware
MICHAEL LOGAN WARE

SUBSCRIBED AND SWORN TO BEFORE ME by the said MICHAEL LOGAN WARE on this 15th day of April, 1991.

Sally Monroe
Notary Public, State of Texas
My commission expires: 12/21/93

SALLY MONROE
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/21/93

Typed or Printed Name of Notary

ROBERT W. RICKARD
MICHAEL LOGAN WARE, P.C.
Board Certified - Criminal Law
Texas Board of Legal Specialization

RICKARD & WARE
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HOUSTON:
(713) 223-9226

April 15, 1991

90-1444

RECEIVED
APR 18 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk of the Court
United States Supreme Court
One First Street N.E.
Washington, DC 20543

Re: The State of Texas, Petitioner vs.
Cary Wayne Cox, Respondent

Dear Clerk:

I am forwarding to you with this letter the following documents with the request that they be filed of record regarding the captioned matter:

1. Motion for Leave to File Brief in Opposition to Petition for Writ of Certiorari in Forma Pauperis; and

2. Brief in Opposition to Petition for Writ of Certiorari.

You will also find enclosed a self-addressed envelope for your convenience in returning a file-marked copy of these documents to the undersigned.

Thank you for your assistance.

Sincerely,

Michael Logan Ware

MICHAEL LOGAN WARE

MLW:spm
Enclosures

cc: Mr. Chris Marshall
Asst. District Attorney
Chief, Appellate Section
Criminal Justice Center
401 West Belknap
Fort Worth, TX 76196

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

THE STATE OF TEXAS (Petitioner) *vs.* CARY WAYNE COX (Respondent)

The Clerk will enter my appearance as Counsel of Record for CARY WAYNE COX

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Michael Logan Ware

(Type or print) Name Michael Logan Ware

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Rickard and Ware

Address 512 Main Street, Suite 911

City & State Fort Worth, Texas Zip 76102

Phone (817) 332-1221

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

MAY 9 PAGE 9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

THE STATE OF TEXAS, PETITIONER

VS.

CARY WAYNE COX, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL LOGAN WARE
The Sinclair Building
512 Main Street, Suite 911
Fort Worth, Texas 76102
(817) 332-1221

ATTORNEY FOR RESPONDENT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1257(a), in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

REASONS FOR DENYING THE PETITION

The State of Texas has improperly petitioned this Court for a Writ of Certiorari in an effort to involve this Court in a case that contains no federal issue. Accordingly, this Court should dispose of the State's purported Writ, if for no other reason, as jurisdictionally improper.

Additionally, should this Court disagree and find that the Petitioner has, at least, proffered a jurisdictionally valid issue in its Petition, a careful reading of the unpublished, intermediate State court opinion upon which the State's Petition is based, reveals that this case does not even involve the proffered issue that the State is attempting to bootstrap into this Court through its Petition.

Finally, if this Court were to yield to the State's arguments, grant the Petition and reevaluate the legal sufficiency of the evidence in this case, this Court would ultimately reach the same result as that reached by the intermediate State appellate court in its published opinion below.

The State has attempted to invoke this Court's jurisdiction to review the decision of the intermediate State court's unpublished opinion pursuant to 28 U.S.C. Sec. 1257(a), which reads as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty

> or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The only appellate issue ever raised by Respondent in his direct appeal from the Trial Court was the legal sufficiency of the evidence to sustain his conviction for involuntary manslaughter. The intermediate State appellate court decided this issue in favor of Respondent and reversed his conviction on this single ground. The Texas Court of Criminal Appeals then declined to exercise its discretionary authority to review the lower court's disposition of this single issue. There is quite simply no federal issue presented by Petitioner that fits within the language of this statute.

The only reference to anything that even sounds like federal law in the lower court's opinion is that court's passing reference to Jackson v. Virginia, 443 U.S. 307 (1979). The court makes this passing reference in its recitation of the Texas standard of review when sufficiency of the evidence is alleged as an issue on appeal in State court. The lower court stated as follows:

> In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. State, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); Houston v.

> State, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984)(opinion on reh'g); Wilson v. State, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983)(opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307,, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. Johnson v. State, 673 S.W.2d 190, 195 (Tex. Crim. App. 1984); Jackson, 672 S.W.2d at 803.

Slip Op., of the court below attached to this Brief as Appendix A.

The State's contention that this language invokes the jurisdiction of this Court is erroneous for a number of reasons. First, the Jackson v. Virginia standard of review is simply a constitutional minimum. Neither Jackson nor any case found which cites Jackson has ever given any indication that Jackson is intended to demark a constitutional maximum beyond which the individual states dare not trod. In fact, it is basic hornbook law that the individual states are free to afford the individuals within its jurisdictional boundaries either more or greater rights than those afforded by the United States Constitution.[1]

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[1] In this respect, the case at bar is clearly distinguishable from York v. Tate, 858 F.2d 322 (6th Cir. 1988) cert. denied, 490 U.S. 1049 (1989), relied on by the Petitioner in its Brief at pages 12-13. York was an appeal pursuant to 28 U.S.C. Sec. 2254 and simply held that the United States Constitution entitled a defendant to no greater protection than that articulated in Jackson v. Virginia. The York opinion did not purport to invalidate the Ohio common law rule of reviewing the sufficiency of circumstantial evidence.

Although there is possibly some controversy within the Texas courts as to whether the "reasonable hypothesis theory," vis-a-vis circumstantial evidence cases, is merely a Texas analytical construct to facilitate the application of Jackson or is, in fact, a different standard of review altogether, the resolution of this controversy, if it in fact exists, is one for the Texas courts to address independent of federal intervention.

Secondly, although the opinion of the court below recites the reasonable hypothesis construct as proper in Texas circumstantial evidence cases, the opinion does not purport to rely on this construct in concluding that the evidence in this particular case was insufficient as a matter of law. There is, in fact, absolutely nothing in the unpublished opinion below from which this Petition emanates to indicate that that court would have reached a different result even if the standard of review had been couched differently. For example, there was no explicit or even implicit attempt to directly apply this construct to the facts of the case-at-bar.

Therefore, even if the proffered State issue raised by Petitioner were somehow found to invoke the jurisdiction of this Court, because the opinion of the court below never addressed this issue, this case would be an inappropriate vehicle for the resolution of this issue.

Lastly, Respondent takes issue with the State's characterization of the facts of this case as they relate to the legal sufficiency of the evidence.

Under Texas law, a review of sufficiency of the evidence begins with the court's charge as given, Boozer v. State, 717 S.W.2d 608, 612 (Tex. Crim. App. 1984). The charge in the case-at-bar read, in pertinent part, as follows:

> The word "intoxication" as herein used means that the person charged does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.
>
> You are instructed that before you would be warranted in convicting the Defendant on involuntary manslaughter as charged in the indictment, you must find and believe from the evidence beyond a reasonable doubt that:
>
> . . . . . .
>
> (b) The Defendant, while so driving, was intoxicated, as that term is defined herein;
>
> (e) That the intoxication, if any, of the Defendant then there [sic] cause or contributed to cause the death of the said Tracey Higgins; or the Defendant, by the means aforesaid and by accident or mistake, by reason of such intoxication, cause the death of Tracey Higgins.

No witness testified that Respondent exhibited slurred speech, staggering, swaying, or any of the other characteristics traditionally associated with intoxication. No witness expressed the opinion that Respondent was ever intoxicated on the night in question.

In its Petition at page 4, the State draws this Court's attention to the fact that the arresting officer signed all the standard "DIC" forms at the hospital requesting a blood or breath specimen of the Respondent. This contention by the State is misleading for at least two reasons. First, the standard

language in all "DIC' forms quoted by the State on page 4 of its Petition is never evidence of intoxication. It is simply a prerequisite to obtaining a breath or blood sample. (R. Vol. IV, pp. 223-227). Second, on cross-examination, the officer admitted that he and the Respondent both signed all the wrong forms which Petitioner now contends this Court erred in not considering. (R. Vol. IV, pp. 223-227).

Perhaps most importantly, the officer himself, who signed the documents, and who testified for the State at trial never expressed the "opinion" at trial, or at any other time, that the Respondent was intoxicated. Petitioner is simply incorrect in asserting that a standard document signed by that officer can supplant the lack of evidence at trial.

Petitioner also makes much of the fact that jurors were told, by State's witnesses, that Respondent had an alcohol concentration of 0.19 and that under the Texas DWI law a person is intoxicated if his alcohol concentration is 0.10 or more. (State's Petition at 4).

First, the Texas DWI laws were not at issue in this case. Second, unlike a "per se" DWI case, the jury was not given any sort of instruction by the trial court as to the meaning of 0.19; nor was any such instruction requested by the State. Petitioner's argument to this Court that the evidence was sufficient because the jury could have inferred the legislative intent on a law that did not apply to the case in front of them

and then could have applied that inference to the case in front of them is incorrect.

Finally, Respondent did not testify in the case-at-bar and there were no eyewitnesses to the accident.[2]

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Petition be dismissed.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

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[2] There was evidence at the hearing on the Motion to Suppress held outside the presence of the jury that Respondent had orally informed police officers at the scene that a car forced him off the road. (R. Vol. II; pp. 113-114; Vol. VIII; p. 11). This oral statement was suppressed along with other oral statements made by Respondent which would have placed the Respondent as the driver of the motorcycle at the time of the accident. (R. Vol. II; pp. 141-144). Said statements were neither disclosed to the jury nor considered by the appellate court on review. It is also worth noting that at trial Respondent attempted to introduce into evidence a properly authenticated accident report of a nearly identical motorcycle accident at the same intersection, which occurred one year, to the day, before the accident in question and which indicated the inherent dangerousness of the intersection. (R. Vol. V; pp. 365-370; Vol. VIII; pp. 51-55). Once again, since the trial court excluded this evidence, this information was neither disclosed to the jury nor considered by the appellate court on review. (Id.).

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of April, 1991, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was forwarded by United States Mail, postage prepaid, to Mr. C. Chris Marshall, Assistant District Attorney, Chief, Appellate Section, Tarrant County Justice Center, 401 W. Belknap, Fort Worth, Texas 76196.

Michael Logan Ware

MICHAEL LOGAN WARE

APPENDIX A

NO. 2-89-072-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

CARY WAYNE COX — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY

OPINION

Cary Wayne Cox was convicted by a jury of involuntary manslaughter. See TEX. PENAL CODE ANN. sec. 19.05 (Vernon 1974). The jury assessed punishment at six years confinement in the Texas Department of Corrections and a $5,000 fine both of which were probated for four years. Cox contends on appeal that the evidence was insufficient to support his conviction for involuntary manslaughter.

We reverse the judgment of the trial court because the evidence is insufficient to sustain his conviction.

On June 27, 1987, appellant, Cary Wayne Cox, and the victim, Tracey Dawn Higgins, attended a party where there was a keg of beer from which the party-goers drank. Sometime between 4:45 a.m.

and 5:00 a.m., Steve Adkins, a fellow party-goer, allowed Cox to take his motorcycle for a ride, and Cox took Higgins along with him.

The accident occurred approximately three blocks from the house where the party was held. Higgins was apparently thrown from the motorcycle and died within one and a half hours after the accident occurred. Testimony revealed that Cox left the scene even though he had also been hurt. He was later found, treated by paramedics, and subsequently taken to Harris Hospital. At the hospital, a blood test was taken which resulted in a 0.19% weight volume ethyl alcohol or 0.19 grams of alcohol per 100 milliliters of blood.

In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. State, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); Houston v. State, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984)(opinion on reh'g); Wilson v. State, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983)(opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia,

443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. Johnson v. State, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); Jackson, 672 S.W.2d at 803.

Appellant contends there is insufficient evidence to prove that he was intoxicated at the time of the accident, or that he was the driver of the motorcycle at the time of the accident. We will not discuss appellant's argument that the State failed to prove he was the driver of the motorcycle at the time of the accident because we find the evidence was insufficient to establish that Cox was intoxicated at the time of the accident.

Cox was convicted of involuntary manslaughter under the former version of TEX. PENAL CODE ANN. sec. 19.05 which provided in part:

> (a) A person commits an offense if he:
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.
>
> (b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical facilities by reason of the voluntary introduction of any substance into his body.

Ch. 426, art. 2, sec. 1, 1973 Tex. Gen. Laws 1122, 1124, amended by ch. 307, sec. 1, 1987 Tex. Gen. Laws 1698.

A review of the record reveals that Cox's ex-girlfriend saw him drink a quarter of a cup of beer and testified that, based on his actions in which Cox chased her around the car, he could have been intoxicated. Adkins, the owner of the motorcycle, testified that he and Cox drank one and one-half beers before Cox left on the motorcycle. He testified he remembered Cox was not drinking earlier because he remembered thinking it was kind of odd not to see him drink. In addition, there was testimony by a police officer, a paramedic, and a witness who came upon the scene of the accident that Cox smelled of alcohol.

Cox concedes there was evidence he had been drinking beer around the time of the accident. However, Cox contends there was no evidence that he had lost the normal use of his mental or physical faculties because of the beer. Therefore, he argues the evidence was insufficient that he was either intoxicated at the time of the accident or that the alleged intoxication actually caused the accident.

The State concedes the expert testimony that the 0.19% blood alcohol concentration which was over the legal limit was not by itself sufficient to show that Cox had lost the normal use of his mental or physical faculties under the definition of "intoxication" in the involuntary manslaughter statute at the time of the offense. However, the State asserts that the testimony that Cox had consumed beer before the accident, the testimony by the police

officer, paramedic, and another witness that Cox smelled of alcohol, and the fact that the blood test revealed 0.19% alcohol rendered the evidence sufficient to sustain the conviction for involuntary manslaughter.

The State directs our attention to Martin v. State, 724 S.W.2d 135 (Tex.App.--Fort Worth 1987, no pet.) and Irion v. State, 703 S.W.2d 362 (Tex.App.--Austin 1986, no pet.). In Martin, the court held the testimony of the arresting officer that the defendant stumbled as he got out of his car, staggered and swayed as he stood, slurred his speech, had bloodshot and watery eyes, and failed three field sobriety tests, together with the testimony of the expert witness who stated that someone who tested at 0.21% on an intoxilyzer test, would not have the normal use of his mental or physical faculties by means of the introduction of alcohol into his system, constituted sufficient evidence to establish the defendant's intoxication at the time of his arrest. Martin, 724 S.W.2d at 137.

Furthermore, the court in Irion held that the opinion testimony of the arresting officer standing alone was sufficient to prove the element of intoxication. Irion, 703 S.W.2d at 364. However, in Irion, as in Martin, the arresting officer testified that the defendant was weaving while driving, had bloodshot eyes, smelled of alcohol, swayed, and failed a field sobriety test. Both of these cases can be distinguished from the present case

because in the present case the only testimony from the officer was that Cox smelled of alcohol. There was no testimony from either the officer, the paramedic, or the other witness that Cox was staggering, swaying, slurring his speech, or had bloodshot eyes. In addition, there was no testimony in the present case as to what effect someone who tested at 0.19% on an intoxilyzer test would have on the normal use of his mental or physical faculties.

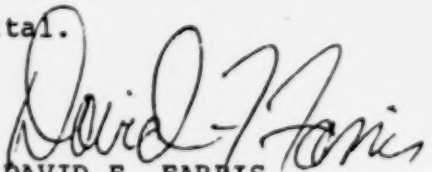
Cox relies on McCafferty v. State, 748 S.W.2d 489, 491 (Tex.App.--Houston [1st Dist.] 1988, no pet.), for the proposition that since the State failed to explain absorption and metabolism rates of intoxication or in any way connect the blood test results to his condition some two hours earlier, the blood test results were insufficient to establish either intoxication at the time of the accident or that the alleged intoxication actually caused the accident. In McCafferty, the court held that the officer's testimony that the defendant was intoxicated when the officer arrived at the accident at 3:50 a.m. together with the breath test showing that the defendant was intoxicated at 4:45 a.m. were alone not sufficient to establish that the defendant was intoxicated at 2:30 a.m. when driving. Id. at 491.

The court further held that the State's expert witness did not explain absorption and metabolism rates or in any way connect the breath test results at 4:45 a.m. to the defendant's condition when driving at 2:30 a.m. and therefore, concluded the State

failed to show that the defendant was intoxicated while driving and found the evidence to be insufficient to support the conviction.

Because the involuntary manslaughter statute in effect at the time of the accident did not provide for having an alcohol concentration of 0.10% or more as a means of proving intoxication, the fact that Cox tested at 0.19% is alone not sufficient without some testimony regarding the effect a 0.19% alcohol concentration would have on a person's mental or physical faculties. Therefore, after a careful review of the record, we hold the evidence was insufficient to sustain his conviction for involuntary manslaughter. Cox's point of error is sustained.

Finding insufficient evidence to sustain appellant's conviction for involuntary manslaughter, we reverse and remand the judgment of the trial court with an order instructing the trial court to enter a judgment of acquittal.



DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS, DAY, JJ.; LATTIMORE, J. (Not Participating)
DO NOT PUBLISH
TEX. R. APP. P. 90(e)

JUN 14 1990

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

No. 90-1444

In The

Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

Petitioner,

vs.

CARY WAYNE COX,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Second Court Of Appeals District Of Texas

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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No. 90-1444

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Petition For A Writ Of Certiorari
To The Court Of Appeals
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District Of Texas

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

I. THE DECISION BELOW INVOLVES A FEDERAL QUESTION: THE PROPER INTERPRETATION OF *JACKSON V. VIRGINIA*'S RATIONAL FACT-FINDER TEST.

Respondent takes the position that the lower court's resolution of his sufficiency claim involved no federal

question. His argument appears two-fold. First, he claims that a "passing reference" to *Jackson v. Virginia*[1] in the opinion does not mean that the court was applying a federal sufficiency test. Second, he argues that the lower court did not actually apply the challenged "outstanding reasonable hypothesis of innocence" construct even though the court identified that theory as part of the law governing appellate review of the sufficiency of the evidence. Brief in Opposition at 2-5.

A. RESPONDENT'S POSITION IN THIS COURT CONFLICTS WITH THE POSITION HE TOOK IN THE TEXAS COURT OF APPEALS.

We quote from the introductory paragraph of Respondent's argument in the Court of Appeals, where he set out the applicable law:

> **The standard of review for challenges to sufficiency claims is whether, viewed in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.** ***Jackson v. Virginia,*** **443 U.S. 307,** 318-19 (1974) [sic]; *Carlsen v. State,* 654 S.W.2d 444, 448 (Tex. Cr. App. 1983) (Opinion on Reh'g). The identical standard is applied to sufficiency challenges involving circumstantial evidence cases. *Carlsen,* 654 S.W.2d at 449. **In assessing this standard, if there is a reasonable hypothesis other than guilt of the accused, then it cannot be said that the guilt has been shown beyond a reasonable doubt.** ***Butler v. State,*** ___ S.W.2d

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[1] *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

> ___ (Tex. Cr. App. No. 69,734 delivered April 5, 1989); ***Carlsen,*** 654 S.W.2d at 450 (McCormick, J. concurring).

Respondent's brief in Ct.App. at 8 (emphasis added), quoting from *Willis v. State,* 785 S.W.2d 378, 380 (Tex. Crim. App. 1989), *cert. denied,* 111 S.Ct. 279 (1990).

Respondent thus acknowledged in the lower court that *Jackson v. Virginia* contained the test governing sufficiency reviews in Texas courts. He expressly drew the court's attention to the related reasonable-hypothesis construct, presumably because be thought it applied to his case, even citing the *Butler* and *Carlsen* decisions which the State has shown are at the heart of the Texas courts' misinterpretation of *Jackson v. Virginia.*[2] See petition at 7-9.

Now, when reliance on those authorities is to his disadvantage, Respondent asserts that the lower court was not really applying a federal sufficiency test and that in any event the reasonable-hypothesis construct had nothing to do with the lower court's resolution of his sufficiency claim. Respondent's change in position is sufficient reason for the Court to ignore those arguments.

---

[2] *Carlsen v. State,* 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Butler v. State,* 769 S.W.2d 234 (Tex. Crim. App. 1989).

B. THE DECISION BELOW REFLECTS THAT IT IS BASED ON THE RATIONAL FACT-FINDER TEST OF *JACKSON V. VIRGINIA* AND THE REASONABLE-HYPOTHESIS-OF-INNOCENCE CONSTRUCT WHICH THE TEXAS COURT OF CRIMINAL APPEALS SAYS MAY BE USED TO APPLY THE *JACKSON* TEST.

The State explained at pages 7-9 of the petition that the Texas Court of Criminal Appeals adopted *Jackson v. Virginia*'s rational fact-finder test as ***the*** standard for reviewing the sufficiency of the evidence to support a criminal conviction. *E.g., Wilson v. State*, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983); *Carlsen v. State*, 654 S.W.2d 444, 448-49 (Tex. Crim. App. 1983); *Butler v. State*, 769 S.W.2d 234, 238-39 (Tex. Crim. App. 1989).

The court below, in reciting the standard it must use in Respondent's case, first set out what is in fact the *Jackson v. Virginia* test (albeit by paraphrase), then provided a pinpoint citation to the exact pages in *Wilson v. State*, supra, and other decisions in which the Court of Criminal Appeals explicitly embraced the *Jackson* test, and ultimately quoted directly from *Jackson* itself to explain the efficacy of that standard of review. Opinion, appendix to the petition at A-2.

In light of these facts and Respondent's own assertions in his brief below that *Jackson v. Virginia* governed the review of his sufficiency claim, Respondent cannot successfully argue that the decision of the Court of Appeals does not involve the sufficiency test of *Jackson*.

As for Respondent's suggestion that the reasonable-hypothesis construct is a subsidiary state-law standard, we reiterate that the Court of Criminal Appeals has

repeatedly held that *Jackson v. Virginia* sets out the ultimate test for evidentiary sufficiency and that the construct is a tool **"for applying" the *Jackson* test.** *Carlsen v. State*, 654 S.W.2d at 449-50; *Butler v. State*, 769 S.W.2d at 238-39 & n.1. Thus, the challenged decisions rest by their own terms on federal law, not on an adequate and independent state ground. This issue was addressed in detail at pages 14-15 of the petition, and Respondent has offered nothing to undermine the State's analysis. The Court has jurisdiction over the question raised by this petition.

This Court should also reject Respondent's suggestion that the lower court did not actually apply the reasonable-hypothesis construct during its sufficiency review. Both Respondent and the Court of Appeals identified the construct as bearing on the sufficiency review when they set out the law which applied to Respondent's claim. Lawyers and judges usually do not so carefully set out such law unless they believe it must be applied to the case before them.

More important, application of the reasonable-hypothesis-of-innocence construct is the only way to explain the reversal in Respondent's case. For the Court of Appeals to reverse under a proper application of *Jackson v. Virginia*, that court would have been required to find that *no* rational trier of fact could have concluded beyond a reasonable doubt that Respondent was intoxicated at the time of the fatal wreck. However, the opinion below never states that no rational trier of fact could have so found, and moreover, such a conclusion would itself have been irrational in light of the evidence that Respondent:

- drank beer throughout the evening at a keg party;
- acted during the party in a manner consistent with previous drunken behavior;
- refused to go to the aid of his stricken companion because he feared the police would arrest him;
- smelled strongly of alcohol at the scene of the wreck;
- and had an alcohol concentration almost twice the legal limit less than two hours later.

See petition at 3-4, 15-16.

This evidence is very incriminating and undoubtedly sufficient for some juries to convict, though the State would concede that at least some juries might also rationally acquit, depending on the weight they accorded these facts. Since a jury could rationally either convict or acquit, the Court of Appeals' attempt to downplay the impact of the evidence demonstrates its use of the reasonable-hypothesis construct. In effect, the appellate court was attempting to show how a jury might have gone about acquitting Respondent, not how the jury could have convicted him. For these reasons, it is clear that the Court of Appeals actually applied the reasonable-hypothesis construct which it had earlier identified as part of the applicable legal standard.[3]

---

[3] This Court would have jurisdiction even if the lower court had not used the reasonable-hypothesis construct but simply made a gross error in applying the basic test of *Jackson v. Virginia*, though we recognize the Court seldom grants review to correct a mistake in the application of settled law to the facts.

II. RESPONDENT'S FACTUAL ANALYSIS REFLECTS THE USE OF THE REASONABLE-HYPOTHESIS CONSTRUCT.

At pages 5-8 of the petition, Respondent attempts to convince the Court that the evidence would be insufficient even under the true test of *Jackson v. Virginia*. However, like the court below, Respondent puts the reasonable-hypothesis construct to work by focusing on the absence of certain facts or the ways in which certain evidence could have been discounted by the jury. For example, he notes that witnesses did not say that Respondent was staggering or slurring his speech and that none of those witnesses rendered an opinion that Respondent was intoxicated. The question under *Jackson*, though, is whether the evidence that was presented could rationally support the verdict. For the reasons stated at pages 15-16 of the petition, the evidence was more than adequate under the *Jackson* test.

Indeed, the jury could have easily rejected the arguments Respondent now makes. For example, witnesses who had seen Respondent at the party were mostly his friends, and the jury could have decided they would shade their testimony in his favor, especially if asked to give an outright opinion on intoxication. In addition, the physical symptoms which could be observed at the scene of the wreck would for the most part have been consistent with shock or a concussion resulting from the accident and thus not particularly probative on intoxication. The critical evidence would have been Respondent's conduct at the party, the alcohol on his breath at the scene, his statements showing a consciousness of guilt, and his high blood-alcohol level.

Respondent's statement that the jury was not given an instruction on the meaning of a 0.19 alcohol concentration is irrelevant since the jury twice heard from experts that the legal limit in Texas was 0.10. R. V – 309-10, 329.

Similarly, Respondent's assertion that the language on the blood-test form is "never" evidence of intoxication and is only a prerequisite to taking a specimen ignores what happened in this case. Such a document normally is viewed only by a judge when ruling on the admissibility of the test result, but here the document was admitted into evidence before the jury *without restriction*. As a result, the jury was entitled to give the form's recitations the weight to which the jurors thought they were entitled.

Respondent also argues that the recitations were meaningless since the officer acknowledged signing the "wrong" form. What the officer admitted was that he mistakenly signed one form that dealt with a suspect's refusal to consent to testing although Respondent actually agreed to the test; the officer did not recant the truth of the other recitations. R. IV – 227-29. In any event, the trial judge admitted two separate forms that contain essentially the same recitations concerning the officer's belief that Respondent was intoxicated. R. VIII – 20 (State's exhibit 25), 22 (State's exhibit 27), both admitted at R. IV – 220-21. For this reason as well, the jury could have decided that it did not matter that the officer had mistakenly signed one of the forms.

Respondent's quibbles over the evidence demonstrate that he asks this Court, as he asked the court below, to canvass the evidence to see whether the jury could rationally have acquitted him, not whether the jury could

rationally have found him guilty. That approach requests the reviewing court to substitute its weighing of the evidence for the rational weighing which the jury undertook. In short, Respondent asks this Court to use the reasonable-hypothesis construct that was so helpful to him in the court below. This is precisely why the Court should grant review and compel the Texas court to apply the true *Jackson* test.

Respectfully submitted,

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